

No. 1-12-3640

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IK APARTMENTS, LLC, a Delaware Limited Liability Company,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
v.)	No. 10 L 11037
)	
COLUMN FINANCIAL, INC., a Delaware Corporation,)	
)	Honorable
Defendant-Appellee.)	Frank B. Castiglione
)	Judge Presiding.
)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *HELD:* The circuit court did not err by dismissing plaintiff's complaint because the allegations in the complaint are insufficient to state causes of action for breach of contract, promissory estoppel, or fraudulent concealment, as defendant was under no obligation, contractual or otherwise, to approve the appraisal provided by plaintiff or disclose its contents prior to executing the loan at issue.
- ¶ 2 Plaintiff, IK Apartments, LLC, appeals from an order of the circuit court of Cook County dismissing its complaint against defendant, Column Financial, Inc. On appeal, plaintiff contends

that the court erred because the allegations in plaintiff's complaint were sufficient to state causes of action for breach of contract, promissory estoppel, and fraudulent concealment. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 On May 3, 2012, plaintiff filed a second amended complaint against defendant, alleging two counts of breach of contract and one count of fraud. Plaintiff asserted that on February 20, 2007, it contracted to purchase a 300-unit residential apartment complex located in Schaumburg, Illinois. The anticipated purchase price was \$32.4 million and the contract required that the purchase take place on or before March 30, 2007. On March 21, 2007, plaintiff and defendant entered into a loan commitment under which defendant agreed to loan plaintiff \$20,565,000 to help finance the purchase of the property. Plaintiff asserted that the loan commitment created a cooperative enterprise whereby plaintiff and defendant agreed to complete the loan only if it was commercially sound and, to that extent, provided that the execution of the loan was subject to defendant's review and approval of a MAI appraisal of the property showing that the loan-to-appraised value ratio was below 80%.

¶ 5 Plaintiff also asserted that defendant obtained a MAI appraisal of the property prior to entering into the loan commitment and that the appraisal valued the property at \$32.7 million, assuming an increase in the occupancy rate of at least 5%, an increase in rents in excess of 10%, the completion of repairs at an estimated cost of \$500,000, and more efficient management of the premises. On March 26, 2007, defendant informed plaintiff that it had reviewed the appraisal and was ready to execute the loan. Upon information and belief, plaintiff asserted that defendant

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did not review the appraisal and that the property was not worth more than \$26 million.

¶ 6 In count one, plaintiff alleged that defendant breached the implied covenant of good faith in the loan commitment by approving the appraisal and executing the loan without advising plaintiff that the valuation of \$32.7 million was based on various assumptions regarding the future use of the property and that plaintiff would not have purchased the property had defendant not approved the appraisal. In count two, plaintiff alleged that defendant breached the loan commitment by failing to review the appraisal. In count three, plaintiff alleged that defendant committed fraud by failing to inform plaintiff that the appraisal valuation was based on various assumptions regarding the future use of the property.

¶ 7 Plaintiff attached a copy of the loan commitment to its complaint, which provided that defendant was committed to providing a loan of \$20,565,000 and that the closing was subject to plaintiff's execution and delivery of all required due diligence, including the delivery of a MAI appraisal of the property in a form acceptable to defendant which showed that the loan-to-appraised value ratio was below 80%. The loan commitment also provided that the execution of the document by defendant shall not imply defendant's approval of "any document, third party report or other information previously furnished to [defendant]," the entire agreement between plaintiff and defendant was contained in the loan commitment, and all changes to the document must be made in writing. Plaintiff also attached a copy of the MAI appraisal to the complaint, which was prepared by Property Valuation Advisors, Inc., and provided that the "as is" market value of the fee simple interest in the property as of February 27, 2007, was \$32.7 million.

¶ 8 On June 4, 2012, defendant filed a motion pursuant to section 2-615 of the Code of Civil

Procedure (735 ILCS 5/2-615 (West 2010)) to dismiss plaintiff's second amended complaint. In its response, plaintiff asserted that count two of its complaint was mistakenly labeled as a claim for breach of contract and was actually a claim of promissory estoppel. On November 8, 2012, the circuit court granted defendant's motion and dismissed plaintiff's second amended complaint with prejudice. In doing so, the court found that plaintiff failed to allege that defendant violated any provisions of the loan commitment, plaintiff could not recover under a theory of promissory estoppel because it admitted the existence of an enforceable contract, plaintiff's fraud claim was more properly characterized as a claim of fraudulent concealment, and plaintiff had not pleaded that defendant had a duty to inform it of the content of the appraisal.

¶ 9

ANALYSIS

¶ 10 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint based on defects apparent from its face. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. The relevant inquiry on such a motion is whether the allegations of the complaint, when considered in the light most favorable to the plaintiff, are sufficient to state a cause of action, and a complaint will only be dismissed if it is clearly apparent that the plaintiff cannot prove any set of facts that will entitle it to relief. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. An order granting a section 2-615 motion to dismiss will be reviewed *de novo*. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18.

¶ 11

I. Breach of Contract

¶ 12 To establish a claim of breach of contract, the plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant,

and damages or injuries to the plaintiff resulting from the defendant's breach. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68. Plaintiff contends that although defendant did not breach any express terms of the loan commitment, defendant breached the agreement's implied covenant of good faith by approving the appraisal.

¶ 13 Every contract in Illinois contains an implied duty of good faith and fair dealing. *Hartz Construction Co., Inc. v. Village of Western Springs*, 2012 IL App (1st) 103108, ¶ 28. "This good-faith principle is used only as a construction aid in determining the intent of the contracting parties." *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 163 (2004). The covenant of good faith and fair dealing requires that a party vested with contractual discretion exercise that discretion in a reasonable manner consistent with the expectations of the parties. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). As the covenant of good faith and fair dealing is implied, rather than expressed, it cannot modify the express provisions of the parties' contract. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 113 (1993).

¶ 14 In this case, section 3.01 of the loan commitment provided that closing was subject to plaintiff's execution and delivery of all due diligence, which included a MAI appraisal in a form acceptable to defendant and showing a value satisfying the loan-to-appraised value requirement of 80% set forth in section 1.04. Thus, the matter of the MAI appraisal was addressed in the text of the loan commitment, which only imposed an obligation on plaintiff to provide defendant with an appraisal which met certain conditions. Plaintiff cannot now impose additional obligations on defendant through the implied covenant of good faith. As such, the allegations in plaintiff's

complaint are insufficient to state a cause of action for breach of contract.

¶ 15

II. Promissory Estoppel

¶ 16 The doctrine of promissory estoppel provides a plaintiff with a method of recovery in the absence of a contract. *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 800 (2005). To establish such a claim, "the plaintiff must prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). As promissory estoppel is intended to enforce promises that are not supported by consideration, a party will be barred from seeking redress under the doctrine of promissory estoppel when the performance the plaintiff is alleged to have detrimentally relied upon supplied the consideration for a contract. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 88.

¶ 17 Plaintiff contends that it stated a cause of action for promissory estoppel in its complaint by alleging that defendant promised in the loan commitment to review and approve the appraisal prior to making the loan and that defendant broke that promise by failing to review the appraisal. As stated earlier, the only obligation imposed on the parties by the express terms of the loan commitment regarding the appraisal was an obligation on plaintiff to provide defendant with an appraisal which met certain conditions. Defendant was not required by the agreement to review and approve the appraisal for plaintiff's benefit, as defendant did not promise to act as plaintiff's advisor but merely agreed to provide plaintiff with a loan. Thus, defendant did not promise in the loan agreement to review and approve the appraisal and plaintiff cannot satisfy the first

element of a claim for promissory estoppel. Moreover, if defendant had promised to review and approve the appraisal as part of its agreement with plaintiff, then that promise would have been part of the consideration supporting the contract and plaintiff would then be barred from seeking redress under a theory of promissory estoppel. As such, the allegations in plaintiff's complaint are insufficient to state a cause of action for promissory estoppel.

¶ 18

III. Fraudulent Concealment

¶ 19 To state a claim for fraudulent concealment, the plaintiff must allege that the defendant concealed a material fact while under a duty to disclose that fact to the plaintiff. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 500 (1996). The plaintiff must establish the existence of a special relationship which would raise a duty to speak. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 94. A duty to disclose a material fact may arise in several different situations, including when the plaintiff and the defendant are in a fiduciary or confidential relationship or when the plaintiff places trust and confidence in the defendant and thereby puts the defendant in a position of influence and superiority. *Connick*, 174 Ill. 2d at 500. The concealment of a material fact during a business transaction may support a claim if the fact was concealed with the intention to deceive under circumstances creating an opportunity and duty to speak. *W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 762 (2004).

¶ 20 Plaintiff contends that defendant assumed a duty to inform plaintiff that the appraisal was based on certain assumptions regarding the future use of the property when defendant approved the appraisal and that defendant fraudulently concealed that the appraisal was based on those

assumptions by failing to disclose that fact. Defendant, however, never "approved" the appraisal. As stated earlier, the only obligation the loan commitment imposed on the parties regarding the appraisal was a requirement that plaintiff provide defendant with an appraisal which met certain conditions. Defendant was under no duty to review the appraisal and then advise plaintiff as to whether the purchase of the property was a sound business decision. Also, the loan commitment provided that defendant's approval of "any document, third party report or other information previously furnished to [defendant]" should not be implied from the execution of the loan. As such, defendant did not have a duty to disclose the content of the appraisal and the allegations in plaintiff's complaint are insufficient to state a cause of action for fraudulent concealment.

¶ 21 Further, to the extent plaintiff purported to allege a claim of fraud in its complaint, the allegations set forth therein are insufficient to state a cause of action for fraud. "The elements of common law fraud are: (1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement." *Connick*, 174 Ill. 2d at 496. Plaintiff has not alleged that defendant made a false statement of material fact but, rather, alleged that defendant concealed a material fact when it approved the appraisal and executed the loan. Thus, we agree with the circuit court that plaintiff's fraud claim is more properly characterized as a claim of fraudulent concealment.

¶ 22 CONCLUSION

¶ 23 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.

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